

“Some of the Most Embarrassing Questions”: Extraterritorial Divorces and the Problem of Jurisdiction Before *Pennoyer*

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In the venerable case of *Pennoyer v. Neff*,¹ the Supreme Court expounded for the first time what limits the Due Process Clause placed on state-court jurisdiction. The Court held that service of process and a defendant’s physical presence in a state when served were necessary and sufficient conditions for the exercise of jurisdiction.² The significance of *Pennoyer*, however, transcends its specific holding, for *Pennoyer*, in the words of one commentator, “represents a particular way of looking at the law of jurisdiction.”³ Although subsequent decisions significantly altered the *Pennoyer* jurisdictional rules, the conceptual structure of the opinion has remained “substantially intact.”⁴

In essence, the Supreme Court conceptualized jurisdiction as a function of state territorial sovereignty; that is, the exclusive right of every state to determine the legal status of everyone and everything within its borders.⁵ If a person entered a state and became subject to its laws, even for a brief period of time, then the state’s tribunals could exercise full authority over him. In the time since *Pennoyer*, the Court’s jurisdictional jurisprudence has continued to exhibit a deep concern for protecting state sovereignty.⁶ The Court looks for

1. 95 U.S. 714 (1877).

2. *Id.* at 733; James Weinstein, *The Early American Origins of Territoriality in Judicial Jurisdiction*, 37 ST. LOUIS U. L.J. 1, 3 (1992).

3. Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 241.

4. *Id.*

5. More specifically, *Pennoyer* turns on the following principles:

[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . [N]o State can exercise direct jurisdiction and authority over persons or property without its territory. . . . [T]he laws of one State have no operation outside of its territory, except so far as is allowed by comity; and . . . no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.

95 U.S. at 722.

6. State sovereignty, however, is no longer clearly the predominant issue in jurisdiction. In one of its most important recent statements on the subject, the Court emphasized the importance of both sovereignty and fairness to defendants:

[A] state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist “minimum contacts” between the defendant and the forum State. The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions.

"minimum contacts" between a state and the parties to a lawsuit,⁷ but imposes few additional constraints on state-court jurisdiction.⁸

By emphasizing state sovereignty, however, the *Pennoyer* approach downplays other interests. It disregards convenience or fairness to litigants, focusing on state rights instead of individual rights.⁹ Moreover, the *Pennoyer* approach provides no mechanism for prioritizing the competing claims of jurisdiction that several states (each with the requisite level of minimal contacts) might possess for a given cause of action. Although national policy interests might provide plausible bases for sorting out such competing claims,¹⁰ the *Pennoyer* approach also subordinates national interests to state rights.

Emphasizing these shortcomings, many scholars have criticized *Pennoyer's* conceptual framework. These critics argue that the law of jurisdiction ought to be more oriented toward individual or national interests, and less toward state interests. Several of these critics have also directly attacked the correctness of the *Pennoyer* decision itself. Among their criticisms is the claim that *Pennoyer* was somehow historically illegitimate because its emphasis on state sovereignty did not reflect prevailing nineteenth-century jurisprudence.¹¹ In developing this argument, some scholars have offered accounts of pre-*Pennoyer* jurisdictional law in which state sovereignty played a lesser role than alternative concerns, such as convenience or procedural fairness.¹²

It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980) (citation omitted).

7. *Pennoyer* required that the level of contact be physical presence within a state. Later decisions expanded a state's potential sphere of authority by permitting the exercise of jurisdiction over absent individuals who had "minimum contacts" with the state. See *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

8. A recent case, *Burnham v. Superior Court*, 495 U.S. 604 (1990), illustrates this point well. In *Burnham*, the Court unanimously upheld the constitutionality of an exercise of jurisdiction by a California court over a New Jersey resident who was served with process during a brief visit to California. Although litigation in California potentially placed a substantial burden on the defendant, Justice Scalia, joined by three other Justices in a case that produced no majority opinion, endorsed the *Pennoyer* rule that states may exercise "transient jurisdiction" over individuals who are merely passing through their territory. *Id.* at 619 (plurality opinion). For further discussion of *Burnham*, see *infra* note 15.

9. By focusing on state sovereignty instead of individual rights, *Pennoyer* creates an odd result. The Court uses the Due Process Clause, which ostensibly protects individuals from states, to protect states from one another. See Weinstein, *supra* note 2, at 59-60.

10. Such national interests might include minimizing forum shopping, minimizing the expense and delays associated with litigation, and promoting interstate harmony.

11. The emphasis on state sovereignty is often referred to as a "federalism theme" in the literature. In this context, a "federalist" is fundamentally concerned with maintaining "the identity of our country as essentially a union of states." John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1015 (1983).

12. See *id.* at 1024 ("[Nineteenth-century courts] accepted the proposition of territorial limits on jurisdiction as a maxim, but they did not justify their use of this proposition as a means to protect federalism or the sovereignty of the states."); Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 292 (1956) (arguing that, prior to *Pennoyer*, convenience was "the basis of all personal jurisdiction"); Hazard, *supra* note 3, at 261 (claiming that early 19th-century cases "are consistent with a variety of jurisdictional theories"); Martin H.

Other commentators, in contrast, have taken issue with the historical claims of *Pennoyer's* critics.¹³ One such scholar has commented:

The game plan of [Professors Redish and Drobak] is clear. Each seeks a unified doctrine of personal jurisdiction throughout our country's history, one which can be explained by reference to a single overarching principle—procedural fairness. . . .

I want to suggest that the conclusion that the early state courts were unconcerned with state sovereignty in invoking the personal jurisdiction doctrine simply distorts history.¹⁴

Disagreement over the proper focus of jurisdictional law has thus generated a historical debate concerning the nature of jurisdiction in the era before *Pennoyer*.¹⁵

This Note seeks to add a new dimension to the scholarship on the early American law of jurisdiction. Previous writers on the question have drawn on a limited number of cases covering a wide range of substantive legal problems, usually providing only cursory treatment of individual cases. This Note, in contrast, will focus on a series of cases concerning one narrow legal problem: the recognition of out-of-state divorces during the antebellum period.¹⁶ Because this Note focuses on a narrow problem, its conclusions about early jurisdictional doctrines must be qualified. Nonetheless, the approach has a number of advantages. At a minimum, it adds many new cases to the debate. More important, by examining one substantive problem in depth, it provides a greater sense of the content and context of the decisions examined, revealing patterns of rhetoric and patterns of results that a more wide-ranging approach fails to capture.¹⁷

Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW U. L. REV. 1112, 1124 (1981) (arguing that pre-*Pennoyer* jurisdictional limits based on personal notice were concerned more with fairness than with "interests of interstate sovereignty").

13. See Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 273 (1990) (discussing arguments of Redish and Drobak); Weinstein, *supra* note 2, at 6 (arguing that "Ehrenzweig/Hazard thesis is inaccurate").

14. Kogan, *supra* note 13, at 273.

15. Interestingly, the scholarly debates over 19th-century jurisdictional law have taken on an added contemporary significance in the wake of *Burnham v. Superior Court*, 495 U.S. 604 (1990). In *Burnham*, Justice Scalia argued that the Fourteenth Amendment permitted exercises of transient jurisdiction simply because American courts have traditionally accepted the validity of transient jurisdiction. In his analysis, Scalia focused particularly on state cases from around the "crucial time" of 1868 when the Fourteenth Amendment was adopted. *Id.* at 611–12. Such an approach to the constitutional dimension of jurisdictional law, focusing on tradition and original intent, lends a renewed importance to the study of 19th-century cases.

16. In generic form, the divorce recognition problem might be presented as follows: A obtains a divorce from B in State X. Subsequently, the validity of the divorce comes before the courts of State Y (perhaps as part of a bigamy prosecution, or because A seeks enforcement of the terms of the divorce). Should State Y accord legal force to the divorce within its borders?

17. Although my analysis of the divorce cases should be complemented by analyses of other specific legal issues, divorce may be a uniquely appropriate point of entry into 19th-century jurisdictional thought. The problem of out-of-state divorces was regarded as one of the most important and difficult in the field

Ultimately, the divorce recognition cases suggest that pre-*Pennoyer* jurisdiction doctrines were indeed primarily concerned with protecting state territorial sovereignty. In the divorce cases, courts adopted and designed jurisdictional tests specifically to protect the territorial integrity of substantive divorce laws: Courts insisted that the state to which a marriage belonged had an exclusive right to apply its laws to end the marriage; divorces granted by other states (those lacking "jurisdiction") represented a territorial overreaching by the laws of the decreeing state. Faced with sister-state divorce decrees, forum courts disregarded an apparent constitutional requirement that such decrees be unconditionally accorded full faith and credit; instead, courts looked to the principles of international law and refused to recognize decrees rendered without proper jurisdiction. Then, in giving content to this jurisdiction test, courts continued to insist on the primacy of the principle of state territorial sovereignty in making several critical doctrinal choices, including the decisions to apply the forum state's jurisdictional law, to limit jurisdiction to the state of domicile, and to dispense with the requirement of service of process on out-of-state defendants.

Part I of this Note considers the context of divorce recognition problems, indicating how the problems were generated in the antebellum period by the interplay of state-specific substantive divorce law, the character of American culture, and the importance of marital status in a variety of legal contexts. Part II examines how courts conceptualized the recognition problem as a question of international, not constitutional, law, and accordingly incorporated a jurisdiction test into recognition jurisprudence. Part III presents the mechanics of the jurisdiction test, covering the threshold questions of jurisdictional analysis (i.e., whose jurisdictional law is applied to which facts), the domicile rule, and the problem of the out-of-state defendant.

I. THE CONTEXT: THE BIRTH AND DEVELOPMENT OF AMERICAN DIVORCE LAW

Several legal and social aspects of antebellum America gave rise to the litigation of out-of-state divorce decrees: the substantial variation in substantive divorce law from state to state; the increasing size of the United States and migratory character of its people; and the variety of types of litigation that might turn on the validity of a divorce decree.

of conflict of laws. See, e.g., *infra* text accompanying note 73. Justice Joseph Story, author of America's seminal treatise on conflict of laws, wrote: "Some of the most embarrassing questions belonging to international jurisprudence arise under the head of marriage and divorce. . . . [I]t is difficult at the present moment to give any answer to them, which would receive the unqualified assent of all nations." JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 203 (Boston, Little & Brown, 3d ed. 1846). Such difficult and important questions prompted a number of thoughtful, and sometimes impassioned, judicial opinions; such opinions, in turn, reveal much about first principles and core beliefs.

At the time of Independence, most American states had little experience with divorce law. Some colonial legislatures had been receptive to divorce suits on a case-by-case basis, but such legislative divorces were squelched by the British government in the years leading up to the Revolution.¹⁸ For a brief period, the colonists were subject to the strict divorce laws of England, which permitted dissolution of a marriage only by an act of Parliament. In the years following Independence, the new American states slowly moved away from the restrictive legislative act requirement. In 1785, Pennsylvania passed the nation's first divorce law, which authorized the state's supreme court to dissolve marriages on four grounds: impotence, bigamy, adultery, or willful desertion for four years.¹⁹ Massachusetts passed a similar law the following year, but declined to permit divorce for desertion.²⁰

As other states followed the lead of Pennsylvania and Massachusetts over the next few decades, clear regional trends emerged. New England states tended to pass divorce laws relatively quickly (mostly in the 1790's), and to provide relatively liberal grounds for divorce, including cruelty.²¹ Southern states operated on the opposite end of the spectrum, limiting themselves through most of the antebellum period to legislative divorces, and granting those, at least initially, with great reluctance.²² South Carolina, in fact, granted no divorces during the entire antebellum period.²³ The Mid-Atlantic states followed a middle path. New York's 1787 divorce law permitted judicial divorces, but limited grounds to adultery.²⁴ By 1860, only South Carolina was more stingy than New York in granting divorces.²⁵ In contrast, as trans-Appalachian states joined the Union, they tended to follow the New England model, granting judicial divorces for a relatively large number of reasons.²⁶

Such variation in the country's divorce laws set the stage for the recognition problem. The strict divorce laws of some states encouraged residents to seek divorces in more lenient jurisdictions, producing thousands of "bad faith" extraterritorial divorces obtained in circumvention of state laws. Litigation over the validity of such divorce decrees became the paradigmatic recognition case, shaping the development of recognition doctrines, and

18. NELSON M. BLAKE, *THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES* 47 (1962).

19. *Id.* at 49.

20. *Id.* at 49–50.

21. *Id.* at 50 (discussing Connecticut, New Hampshire, Vermont, and Rhode Island).

22. *Id.* at 51 (discussing Maryland, Virginia, and Georgia).

23. *Id.* at 63.

24. *Id.* at 50.

25. *Id.* at 63.

26. *Id.* at 50–51 (discussing Tennessee, Ohio, and Kentucky). Although the substantive divorce laws varied significantly from state to state, all states, even the most liberal, employed a fault-based approach to divorce. Suits for divorce were conceived of as adversarial proceedings, whose purpose was to determine guilt and punish it. As Part III demonstrates, this approach led some courts to conceptualize divorce as a matter of criminal law, a categorization that had important ramifications for jurisdictional analysis

perhaps contributing to the acute suspiciousness with which the strict states regarded all extraterritorial divorces.²⁷

The increasingly migratory character of American society and the growing number of states in the Union added to the recognition problem.²⁸ Antebellum divorce cases are full of stories of couples who were married in one state, moved together to another, and then separated and moved to two new states. In such instances, each state might claim that its laws should rightfully govern the couple's marital status, a conflict producing a number of difficult legal puzzles.²⁹ Furthermore, the changing face of American society may also have contributed to the number of marital breakups by facilitating desertion. The increasingly important American values of geographical and social mobility encouraged unhappy husbands to start new lives in new locales. In such a context, it is unsurprising that desertion was the single most common cause of divorce.³⁰

A final factor augmenting the volume of challenges to out-of-state divorces was the variety of proceedings in which the validity of a divorce might be at issue. Among these proceedings were prosecutions for bigamy,³¹ attempts by ex-wives to recover their dowries,³² defenses against more recent divorces with less advantageous terms,³³ and attempts to protect rights to the estates of intestate spouses.³⁴ The importance of divorce decrees in such legal settings, together with the nature of antebellum divorce law and the character of American society, frequently put the validity of out-of-state divorce decrees before American courts.

Since the status of a marriage could affect many rights, uniformity of recognition doctrines would have been worthwhile to avoid the troubling issue of having a "marriage relation . . . deemed subsisting in one State and dissolved in another."³⁵ Chief Judge Lemuel Shaw of Massachusetts made this point most clearly:

27. Significantly, though, a "good faith" divorce (i.e., a divorce granted by the state in which the petitioner truly resided) could also pose difficulties for a forum court when spouses resided in separate states at the time of divorce. See *infra* part III.B.

28. For a discussion of some of the causes and consequences of the great degree of mobility in 19th-century America, see Lawrence M. Friedman, *Crimes of Mobility*, 43 STAN. L. REV. 637 (1991). Friedman observes that this geographical mobility was connected to the American ideals of social mobility and "getting ahead" and was "at the core of American practical thought." *Id.* at 656.

29. See discussion *infra* part III.B.

30. Neal R. Feigenson, *Extraterritorial Recognition of Divorce Decrees in the Nineteenth Century*, 34 AM. J. LEGAL HIST. 119, 123 (1990) (quoting Norma Basch, *The Victorian Compromise: Divorce in New York City, 1787-1870*, at 20 (unpublished paper delivered at 1985 Annual Meeting of the Organization of American Historians)).

31. *Thompson v. State*, 28 Ala. 12 (1856).

32. *Harding v. Alden*, 9 Me. 140 (1832).

33. *Lyon v. Lyon*, 68 Mass. (2 Gray) 367 (1854).

34. *Bradshaw v. Heath*, 13 Wend. 407 (N.Y. Sup. Ct. 1835).

35. *Harteau v. Harteau*, 31 Mass. (14 Pick.) 181, 187 (1833).

So many interesting relations, so many collateral and derivative rights of property, and of inheritance, so many correlative duties depend upon the subsistence of this relation, that it is scarcely possible to overrate the importance of placing it upon some general and uniform principle, which shall be recognised and adopted in all civilized states.³⁶

Although the value of such uniformity is apparent, it was never achieved during the antebellum period. Instead, courts consistently chose other values over uniformity, particularly the value of state territorial sovereignty.

II. THE ADOPTION OF THE JURISDICTION TEST

As courts confronted the problem of out-of-state divorces, they adopted a less-than-obvious rule: A “foreign” divorce would only be recognized as valid in the forum state if the decreeing foreign court had had proper jurisdiction. Temporarily setting aside the question of what constitutes proper jurisdiction, this Part argues that the adoption of the jurisdiction rule represented an effort by forum courts to establish authority over the marital status of parties before them—in effect, to protect forum state sovereignty from encroachment by the laws of other states. First, state courts rejected a potentially simple solution to the recognition problem in the form of the Full Faith and Credit Clause, and the rejection of this approach in favor of the jurisdiction rule significantly augmented the discretion of forum courts. Second, the derivation of the jurisdictional requirement from principles of international law and comity further suggests that state sovereignty was of primary concern in the development of the rule.

A. *The Road Not Taken: Mandatory Recognition Through the Full Faith and Credit Clause*

A comparatively simple solution existed for the recognition problem: Courts could have interpreted the Full Faith and Credit Clause as mandating recognition of out-of-state divorces. Indeed, this interpretation may have been required after 1813 by the Supreme Court’s decision in *Mills v. Duryee*.³⁷ State courts, however, consistently ignored the constitutional dimension of the divorce recognition cases, which, in effect, endowed the courts with greater ability to protect state sovereignty.

36. *Id.*

37. 11 U.S. (7 Cranch) 481 (1813).

1. *The Constitutional Framework*

In the nineteenth century, or today, a litigant seeking to take advantage of a divorce decree from another state might begin her case by referring to Article IV of the United States Constitution, which states, "Full Faith and Credit shall be given in each state to the public Acts, Records, and judicial Proceedings of every other state. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."³⁸ The litigant might also refer to the Act of 1790, in which Congress implemented the Full Faith and Credit Clause:

And the said records and judicial proceedings [of the courts of any state] . . . shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken.³⁹

This law seems to establish how a state should treat the divorce decrees of other states: with the same "faith and credit" that the decreeing states themselves would provide their own decisions.

Despite the clarifying language of the Act of 1790, however, the precise requirements of the Full Faith and Credit Clause long remained unclear. Some state courts interpreted the Clause to require a *res judicata* effect for sister-state judgments; others maintained that the Clause merely required the admission of such judgments into evidence; still others simply expressed doubt or confusion.⁴⁰ It was in this context of uncertainty over the effect of the Full Faith and Credit Clause that New York faced its first major case on the recognition of extraterritorial divorces. Setting the pattern for many subsequent divorce cases, New York simply neglected the potential requirement of the Full Faith and Credit Clause for mandatory recognition.

38. U.S. CONST. art. IV, § 1.

39. Act of May 26, 1790, ch. 11, 1 Stat. 122 (codified as amended at 28 U.S.C. § 1738 (1988)).

40. For a discussion of the leading cases between 1790 and 1813, see Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses* (pt.1), 14 CREIGHTON L. REV. 499, 559-64 (1981). Explaining the meaning of "faith and credit," Whitten argues that the legislative intent was most likely to guarantee admission of sister-state judgments into evidence. *Id.* at 557-59. Joseph Story articulates the more traditional federalist argument, that Congress would not have bothered to protect the evidentiary value of sister-state judgments because such "faith and credit" was already accorded; therefore, Story concludes, the 1790 Act only makes sense in a *res judicata* formulation. JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1303 (photo. reprint 1991) (1833).

2. Jackson v. Jackson: A Paradigmatic Early Case

In October 1802, Nancy Jackson traveled from her home in New York to Vermont, where she hoped to obtain a divorce from her husband Archibald. According to the petition she filed in Vermont, her husband “beat her, [] threatened her life, and [possessed such a] severity of temper [that] it was impossible that she could live with him.”⁴¹ Vermont, unlike New York, recognized such cruelty as an adequate ground for divorce, so a trip to Vermont seemed to be Mrs. Jackson’s best hope for obtaining relief. Her divorce was duly granted in February 1803, and the Vermont court further decreed that Mrs. Jackson was entitled to an alimony payment of \$1500. Her mission in Vermont accomplished, Mrs. Jackson promptly returned to New York; two years later, she brought suit in New York against her erstwhile husband for alimony.

In arguments, Mr. Jackson’s attorney, Bleecker, noted, “This, if not a difficult, is certainly a new case, and involves a question of great importance to the laws of this state, and to the interests of its citizens.”⁴² Bleecker framed the issue as one of sovereignty: The recognition or nonrecognition of the Vermont divorce would determine whether “we are to be governed by the laws of another state, or by those of our own.”⁴³ Citing the Dutch authority Ulrich Huber, Bleecker acknowledged the general rule that anyone within the physical territory of a state—whether permanently or temporarily—was subject to the exclusive jurisdiction of that state; however, Bleecker argued, this rule did not apply to questions of status, which were properly governed only by the state of a person’s permanent residence, or domicile. Thus, because Mrs. Jackson’s domicile remained in New York while she was getting her out-of-state divorce, Vermont’s decree was an unjustified extraterritorial exercise of power.

Having attacked the validity of the divorce decree, Bleecker then argued that New York was under no obligation to honor it:

Though a general principle of convenience, in regard to the intercourse of mankind, has produced the general rule respecting the *lex loci*; yet every writer on this subject admits, that where the laws of one country are injurious to another, are repugnant to *morality* or *policy*, or are attended even with *inconvenience*, they are not to be considered as valid within a different jurisdiction.⁴⁴

Although Bleecker apparently felt that foreign judgments could be declared void for minimal cause (even “inconvenience”), he argued that there were

41. Jackson v. Jackson, 1 Johns. 424, 425 (N.Y. Sup. Ct. 1806).

42. *Id.* at 426.

43. *Id.*

44. *Id.* at 427.

strong reasons for refusing to recognize Vermont divorces of New York residents:

If this decree be sustained, the consequence will be, that we shall be governed by the laws of Vermont [T]he marriage ties, which should be permanent *and* indissoluble, except by death, or the criminality of either party, may be broken for the slightest cause. . . . The laws of *Vermont* to-day, authorise divorces for ill treatment, and severity of temper; to-morrow, they may adopt the Roman law, and grant divorces, because the wife had been at a play, or been seen in the street with her head uncovered. The consequences, too, not only as to the peace and happiness of families, but as it respects the rights of property . . . deserve serious consideration.⁴⁵

Finally, almost as an afterthought, Bleecker addressed the possible constitutional objections to his argument: "Notwithstanding the political compact that connects the *United States* as a federal republic, the several states must be considered as distinct and independent sovereignties"⁴⁶ Nowhere is the Full Faith and Credit Clause specifically mentioned.

Bleecker's theory of the case was largely adopted by the court in a perfunctory opinion. Judge Spencer held: "[P]roper deference is due to the decisions of the courts of justice in a neighbouring state, [only] in a case properly before them, and when they do not encroach on the rights of other states."⁴⁷ No deference was owed to Mrs. Jackson's divorce decree because Mrs. Jackson had never become a domiciliary of Vermont; rather, she had only gone to Vermont to evade the laws of New York. "It may be laid down as a general principle," Spencer wrote, "that when ever an act is done in *fraudem legis*, it cannot be the basis of a suit, in the courts of the country whose laws are attempted to be infringed."⁴⁸ The court was not so emphatic as Bleecker in arguing that states could disregard sister-state judgments at will, but it was at the least unclear what constraints the *Jackson* court would have placed on the rights of forum courts to deny recognition rights of such judgments. Certainly, the Constitution was nowhere mentioned as a limiting force.

3. *Mills v. Duryee: The Invisible Precedent*

Though seven years too late for Mrs. Jackson, the Supreme Court clarified and strengthened the Full Faith and Credit Clause in *Mills v. Duryee*.⁴⁹ The case involved an action of debt brought in the District of Columbia on the

45. *Id.* at 429.

46. *Id.*

47. *Id.* at 432.

48. *Id.* at 433.

49. 11 U.S. (7 Cranch) 481 (1813). For subsequent Supreme Court development, see discussion *infra* note 80.

judgment of a New York state court. The defendant pleaded *nil debet*, which was adjudged an insufficient plea by the circuit court. Interpreting the Full Faith and Credit Clause, the Supreme Court affirmed. Writing for the Court, Justice Story argued:

Were the construction contended for by the [defendant] to prevail, that judgments of the state Courts ought to be considered *prima facie* evidence only, this [Full Faith and Credit] clause in the constitution would be utterly unimportant and illusory. The common law would give such judgments precisely the same effect. . . . And we can perceive no rational interpretation of the [implementing] act of congress, unless it declares a judgment conclusive when a Court of the particular state where it is rendered would pronounce the same decision.⁵⁰

Thus, after *Mills*, it was clear that the Constitution, through the Act of 1790, limited the discretion of states in deciding whether or not to grant *res judicata* effects to sister-state judgments. More specifically, the decision required that such foreign judgments be treated as conclusive on the merits as they would be regarded in the states where they were made. Unless divorce decrees merited treatment different from other judgments, the *Mills* decision seemed to demand that divorces such as Mrs. Jackson's be recognized.

In deciding subsequent extraterritorial divorce cases, however, state courts seem to have largely ignored *Mills*, and to have taken no greater cognizance of the Full Faith and Credit Clause than did the *Jackson* court.⁵¹ Leading divorce decisions in Massachusetts, New York, Ohio, and South Carolina between 1813 and 1850 make no reference to the Full Faith and Credit Clause.⁵² In cases where the constitutional issue was raised, it does not appear to have played an important role, and nowhere does *Mills* furnish the rule of decision.⁵³ In contrast, state courts frequently cited *Jackson* after 1813, though one might have thought that *Mills* should have substantially reduced the

50. 11 U.S. (7 Cranch) at 485. Justice Story made the same argument in his treatise on the Constitution twenty years later. See discussion *supra* note 40.

51. The treatment of *Mills* in the divorce context may have been no different from its treatment in other contexts. Certainly, the courts grappling with divorce recognition cases made no effort to distinguish divorce decrees from other sorts of records or proceedings under the Full Faith and Credit Clause. Furthermore, it appears that state courts generally tended to qualify, distinguish, or otherwise limit the holding of *Mills* in all types of recognition cases. See Whitten, *supra* note 40, at 571–72. Thus, the treatment of *Mills* in the divorce context seems part of a broader revolt by state courts against Justice Story's original vision of the Full Faith and Credit Clause. See discussion *infra* note 80.

52. See *Inhabitants of Hanover v. Turner*, 14 Mass. 227 (1817); *Pawling v. Willson*, 13 Johns. 192 (N.Y. Sup. Ct. 1816); *Mansfield v. McIntyre*, 10 Ohio 27 (1840); *Hull v. Hull*, 20 S.C. Eq. (2 Strob. Eq.) 174 (1848).

53. See, e.g., *Tolen v. Tolen*, 2 Blackf. 407 (Ind. 1831); *Harding v. Alden*, 9 Mc. 140 (1832); *Irby v. Wilson*, 21 N.C. (1 Dev. & Bat. Eq.) 568 (1837). As discussed *infra* in Section B of this Part, when courts did incorporate the Full Faith and Credit Clause into their analysis, they treated the Clause as containing a jurisdictional test that was not part of the *Mills* vision.

force of the earlier decision.⁵⁴ Thus, as state courts grappled with the problem of extraterritorial divorce throughout the antebellum period, the Full Faith and Credit Clause was rarely even the starting point of analysis, much less the end of the inquiry.

B. *The Road Taken: International Law and the Requirement of Jurisdiction*

Rather than conceptualizing the divorce recognition problem as a constitutional issue, courts approached the problem as one of international law and comity. The principles of international law and comity, in turn, led courts to incorporate a jurisdictional test into their recognition doctrines. That the essential function of this test was to protect forum state sovereignty is suggested not only by its adoption as an alternative to the sovereignty-threatening *Mills* approach, but also by its linkage to the antebellum notion of "comity." Furthermore, as courts developed and implemented the jurisdiction test, they tended to emphasize that its primary purpose was to protect sovereignty. Indeed, as some courts sought to constitutionalize the jurisdiction requirement (a move that was ultimately accepted by the Supreme Court), the linkage between the requirement and sovereignty concerns remained clear.

1. *Conceptualizing the Problem: International Law and Comity*

Concerned with state sovereignty, state courts employed international law rather than the Constitution as the framework of their analysis, fixing particularly on the principle of comity. The choice was a natural one because international law was fundamentally concerned with the boundaries of the sovereign power of nations, and it is clear that the state courts viewed international law in precisely this way. Their decisions are full of such pronouncements as: "Just principles of international amity require that there should be conceded to each State control over the matrimonial condition of its own citizens";⁵⁵ "[A]ccording to the well settled principles of international law . . . every nation has exclusive sovereignty and jurisdiction within its territory";⁵⁶ "The general law does not deprive a state of its proper jurisdiction over the condition of its own citizens";⁵⁷ and, "[Vermont's

54. See, e.g., *Harding*, 9 Me. at 151; *Inhabitants of Hanover*, 14 Mass. at 231; *Pawling*, 13 Johns. at 205.

55. *Thompson v. State*, 28 Ala. 12, 18 (1856). This quotation and the following are intended to be brief illustrations of the rhetorical use of international law and comity; further examples will appear throughout this Note.

56. *Leith v. Leith*, 39 N.H. 20, 33-34 (1859).

57. *Ditson v. Ditson*, 4 R.I. 87, 106 (1856).

divorce laws] are not to be justified by any principles of comity which have been known to prevail in the intercourse of civilized states.”⁵⁸

For many nineteenth-century jurists, the guiding principle of international law was that nations should adopt a stance of enlightened self-interest with respect to the enforcement of the laws of other nations, and that no authority *required* a sovereign state to defer to the laws of other sovereign states. As Story wrote:

The true foundation, on which the administration of international law must rest, is, that the rules, which are to govern, are those, which arise from mutual interest and utility, from a sense of the inconveniences, which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return.⁵⁹

This understanding of international law was also captured in the nineteenth-century notion of comity, a critical concept of international law on which many of the divorce cases turned. On this subject, Story observed:

It has been thought by some jurists, that the term, “comity,” is not sufficiently expressive of the obligation of nations to give effect to foreign laws, when they are not prejudicial to their own rights and interests. And it has been suggested, that the doctrine rests on a deeper foundation; that it is not so much a matter of comity, or courtesy, as a matter of paramount moral duty. Now, assuming, that such a moral duty does exist, it is clearly one of imperfect obligation, like that of beneficence, humanity, and charity. Every nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions, on which its exercise may be justly demanded.⁶⁰

For antebellum American jurists, the primary authority on comity was the seventeenth-century Dutch legal thinker Ulrich Huber,⁶¹ and, more specifically, the following axioms from Huber’s treatise on the conflict of laws:

(1) The laws of each state have force within the limits of that government and bind all subjects to it, but not beyond.

58. *Barber v. Root*, 10 Mass. 260, 266 (1813).

59. STORY, *supra* note 17, § 25.

60. *Id.* § 33 (citations omitted).

61. See ALAN WATSON, JOSEPH STORY AND THE COMITY OF ERRORS: A CASE STUDY IN THE CONFLICT OF LAWS 54 (1992) (“[F]or comity Huber was the undisputed master.”) As an example of Huber’s “impressive authority,” Watson notes: “Alexander James Dallas, the reporter of the U.S. Supreme Court, paid Huber the honor [in 1797], never repeated in this country for other scholars of the subject, of translating the relevant chapter [of Huber’s treatise], and inserting it into the reports of the Supreme Court.” *Id.* at 49.

(2) All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof.

(3) Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or of its subjects.⁶²

These axioms further suggest that applying the principle of comity, as understood by both Huber and the nineteenth-century Americans, involved identifying the interests of a forum state and applying foreign laws only so far as such application did not prejudice the forum's interests.

Significantly, Story understood Huber's axioms to be clearly oriented towards territorial sovereignty. Relying on Huber, Story articulated his own "general maxims of international jurisprudence" as follows:

I. . . . [E]very nation possesses an exclusive sovereignty and jurisdiction within its own territory. The direct consequence of this rule is, that the laws of every state affect, and bind directly all property, whether real or personal, within its territory; and all persons, who are resident within it, whether natural born subjects, or aliens

II. . . . [N]o state or nation can, by its own laws, directly affect, or bind property out of its own territory, or bind persons not resident therein, whether they are natural born subjects, or others. . . .

III. . . . [W]hatever force and obligation the laws of one country have in another, depend solely upon the laws, and municipal regulations of the latter⁶³

In such a vision of international law, the force of a state's law is coterminous with the state's borders, unless another state is led by comity (i.e., courtesy) to give the law effect within its borders. Courts that faced foreign divorces and that looked to Huber, Story, and the principle of comity for assistance may have thus built into their analysis both a tendency towards nonrecognition of the divorces and, more generally, a fundamental concern for the territorial sovereignty of their own states.

62. Ernest G. Lorenzen, *Huber's De Conflictu Legum*, 13 ILL. L. REV. 375, 403 (1919) (citations omitted) (translating ULRICH HUBER, *De Conflictu Legem Diversarum in Diversis Imperiis*, in 3 PRAELECTIONUM JURIS CIVILIS tit. 3, pt. 2, bk. 1, ¶ 2).

63. STORY, *supra* note 17, §§ 18–23 (citing Huber as authority for first and third propositions). This passage of Story's was, in turn, cited in *Pennoyer* as authority for the principles of territorial sovereignty discussed *supra* note 5. *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877). Professor Hazard argues that Story actually took Huber too far, causing important (and negative) consequences for the development of American jurisdictional law. Hazard, *supra* note 3, at 260 ("A mild statement about territorial sovereignty is converted into a rule limiting judicial discretion."). Professor Weinstein, however, has looked to Huber's vernacular writings and has found that Huber did indeed intend for his maxims to provide "highly territorial jurisdictional rules" along the lines of Story's maxims. James Weinstein, *The Dutch Influence on the Conception of Judicial Jurisdiction in 19th Century America*, 38 AM. J. COMP. L. 73, 92 (1990).

Framing the recognition issue as one of international law, and not constitutional law, offered an additional advantage for a state wishing to protect the integrity of its laws: Cases lacking a federal question were not open to review by the Supreme Court. Consequently, each state was free to develop its own rules to govern the recognition of extraterritorial divorces, which led to the multiplicity of doctrines to be discussed below. Potentially increasing this diversity, state legislatures could override "international law" as they could not constitutional law, and state legislatures occasionally took advantage of this opportunity.⁶⁴ Thus, framing the divorce recognition issue as one of international law not only made sovereignty concerns central to the debate, but also served to augment sovereignty at the less abstract level of inhibiting judicial review by the Supreme Court.

2. *Implementing the Jurisdiction Test*

The principles of international law and comity discussed in the preceding Subsection provided states with a great deal of latitude in deciding whether or not to apply foreign laws. In the context of recognition cases, forum states could enforce some foreign judgments, but could treat others differently. With such leeway, nineteenth-century American courts developed recognition doctrines that comported with their desire to protect state sovereignty.

As a legal concept, jurisdiction had been part of the English common law tradition since the Middle Ages; however, at common law, jurisdiction was a tangled web of "charter, prerogative, personal privilege, corporate liberty, ancient custom, and the fortuities of rules of pleading, venue, and process."⁶⁵ Nineteenth-century American notions of jurisdiction apparently owe more to Continental sources, especially Huber, than to English traditions, although the details of how the concept of jurisdiction was transformed in this country remain unclear.⁶⁶ Regardless of the precise sources of the doctrine, it is clear that early nineteenth-century courts insisted that sister-state judgments would not be enforced unless rendered with proper jurisdiction.⁶⁷

64. In 1836, for instance, the Massachusetts legislature passed a law stating: "[W]hen any inhabitant of this state shall go into any other state or country, in order to obtain a divorce for any cause which had occurred here, and whilst the parties resided here, or for any cause which would not authorize a divorce by the laws of this state, a divorce so obtained shall be of no force or effect in this state." MASS. GEN. L. ch. 208, § 39 (1987).

65. Hazard, *supra* note 3, at 252–53.

66. *Id.* at 258. Professor Weinstein hypothesizes that the similarity between American and Dutch conceptions of jurisdiction as a device to protect territorial sovereignty may be related to the fact that both nations were initially formed as loose confederations of rival states, in contrast to the highly centralized government of England; the similar political structures of the United States and Dutch provinces either made the United States exceptionally receptive to Dutch ideas or, perhaps, led to the independent adoption of identical principles. Weinstein, *supra* note 63, at 98.

67. Whitten, *supra* note 40, at 571 (citing numerous cases).

Courts made no exception for divorce and required jurisdiction as a necessary predicate to recognition.⁶⁸ In these cases, courts derived the jurisdiction requirement from the principles of international law discussed above, and often made clear that the requirement was intended primarily to protect the territorial sovereignty of forum states.⁶⁹ In a common rhetorical trope, the courts described the exercise of judicial power without proper jurisdiction with images of the offending state reaching beyond its borders into the territory of other states. "It is a general rule," held a Massachusetts court (citing Huber), "that the laws of a state apply to all who are within its limits."⁷⁰ The court went on to conclude, "If we were to give effect to this [Vermont divorce] decree, we should permit another state to govern our citizens"⁷¹ In a later case, a Rhode Island court, commenting on a particular rule of jurisdiction, stated, "This necessarily results from the right of every nation or state to determine the *status* of its own domiciled citizens or subjects, without interference by foreign tribunals in a matter with which they have no concern."⁷²

State sovereignty concerns in recognition cases may have been particularly strong in the context of marriage and divorce. In 1852, an Alabama court argued:

Now, it is most unquestionably true, that no independent State could for a moment tolerate any interference on the part of a foreign tribunal with this, the most sacred and important of all the domestic relations which obtain among its citizens. It is a relation, the intermeddling with which involves consequences most usually reaching far beyond the immediate parties to it, as it lies at the very basis of civilized society, and becomes so interwoven with its very framework, as to render it the peculiar object of exclusive control, by the laws and tribunals where it exists.⁷³

In sum, because the jurisdiction test had its genesis in the principles of international law and comity articulated by Huber and Story, the test primarily reflected a concern for state sovereignty, a concern that may have been especially acute in the divorce context.

68. See, e.g., *Harrison v. Harrison*, 20 Ala. 629, 645 (1852); *Harding v. Alden*, 9 Me. 140, 149–50 (1832); *Barber v. Root*, 10 Mass. 260, 265 (1813); *Pawling v. Willson*, 13 Johns. 192, 206 (N.Y. Sup. Ct. 1816); *Irby v. Wilson*, 21 N.C. (1 Dev. & Bat. Eq.) 568, 578 (1837); *Dorsey v. Dorsey*, 7 Watts 349, 352 (Pa. 1838); *Ditson v. Ditson*, 4 R.I. 87, 93 (1856); *Hubbell v. Hubbell*, 3 Wis. 662, 664 (1854).

69. Professor Whitten observes a similar trend in nondivorce cases that imposed a jurisdictional requirement for recognition of foreign judgments: "[The international rules of jurisdiction] were conceived of as rules governing the relations of sovereigns with each other, not as rules limiting the legislative authority of a sovereign to bind its own courts internally." Whitten, *supra* note 40, at 580.

70. *Inhabitants of Hanover v. Turner*, 14 Mass. 227, 230–31 (1817).

71. *Id.* at 231.

72. *Ditson*, 4 R.I. at 93–94.

73. *Harrison v. Harrison*, 20 Ala. 629, 644–45 (1852).

3. *Constitutionalizing the Jurisdiction Test*

While the majority of the divorce recognition cases ignored or downplayed the constitutional dimension of the problem, others suggested an alternative way around the mandatory recognition requirement of *Mills*: incorporating a jurisdictional test into Full Faith and Credit Clause analysis. Although this alternative approach was largely developed outside of the divorce recognition context,⁷⁴ one of the seminal cases in the effort by state courts to constitutionalize the jurisdictional requirement, *Borden v. Fitch*,⁷⁵ was a divorce case.⁷⁶

In a singularly convoluted fact pattern, Mrs. Borden, a New York widow, sought \$5000 from Stephen Fitch as compensation for harms done to her daughter (his wife) Rebecca. After two months of marriage, Rebecca left Mr. Fitch because of his frequent threats and verbal abuse, which had been so harsh as to impair "her health and all her faculties."⁷⁷ While apparently glad to have her daughter back, Mrs. Borden was left with the expense of nursing her daughter back to health. She sought recovery for these expenses and for the lost value of Rebecca's needlework, which had helped to support the Borden family before the marriage. At trial, Rebecca was called as a witness, to which Mr. Fitch objected, because wives were not permitted to testify against their husbands at common law. Fortunately for the Bordens, an earlier marriage of Mr. Fitch's had come to light before the trial. Mrs. Borden argued that the marriage to Rebecca was bigamous and, therefore, invalid. In reply, Mr. Fitch produced a Vermont divorce from his first wife. The judge ruled that the divorce was invalid, Rebecca was permitted to testify, and Mrs. Borden was awarded her \$5000 by the jury. On appeal, Mr. Fitch argued that his divorce should have been recognized.

In considering what standard of faith and credit was owed to the Vermont divorce, Chief Judge Thompson began by noting the accepted rule that foreign judgments should be rejected if rendered without proper jurisdiction.⁷⁸ Next, Thompson considered the effect of the Constitution and, specifically, of *Mills*, on the accepted rule:

The case of *Mills v. Duryee* . . . has been very much pressed upon us, as a binding and controlling decision, as to the conclusiveness of this divorce in *Vermont*. Although I have a very strong conviction, that the constitution of the *United States* and [1790] law of Congress cannot be applied to a judgment which we consider void upon the first

74. For discussions of nondivorce cases that introduced jurisdictional principles into Full Faith and Credit, see Kogan, *supra* note 13, at 279-94; Whitten, *supra* note 40, at 570-72.

75. 15 Johns. 121 (N.Y. Sup. Ct. 1818).

76. See Kogan, *supra* note 13, at 291.

77. *Borden*, 15 Johns. at 124.

78. *Id.* at 141-42.

principles of justice, so as to make it conclusive upon us, yet the very high respect I entertain for that Court, would make me hesitate, and doubt the correctness of my own judgment, did I believe it to have been the intention of that Court thus far to extend the construction of the constitution and laws of the *United States*. But I cannot persuade myself that it was so intended.⁷⁹

The court went on to affirm the invalidation of the Vermont divorce, though on the grounds that it was obtained through both fraud and fraud on the laws, leaving unclear to what extent the opinion sought to modify *Mills*. Nonetheless, *Borden's* juxtaposition of a discussion of the international law jurisdiction test with a questioning of the *Mills* interpretation of the Full Faith and Credit Clause did not go unnoticed by other courts. Indeed, *Borden* was frequently cited in later cases to support the proposition that the Full Faith and Credit Clause should be limited by jurisdiction.⁸⁰

Interestingly, the development of Full Faith and Credit Clause analysis in the divorce context was mirrored by the development of another constitutional provision, the Contracts Clause.⁸¹ Theoretically, the Clause might have been implicated in the out-of-state divorce problem because antebellum law conceptualized marriage as a form of contractual relationship,⁸² but courts discussed this constitutional issue even less frequently than they did the Full Faith and Credit Clause.⁸³ When courts did consider the potential role of the

79. *Id.* at 143-44.

80. See, e.g., *Leith v. Leith*, 39 N.H. 20, 21 (1859); *Bradshaw v. Heath*, 13 Wend. 407, 416 (N.Y. Sup. Ct. 1835).

Faced with such a revolt from state courts, the Supreme Court backed away from its position in *Mills*. In *Hampton v. McConnel*, Chief Justice Marshall noted, with respect to actions to enforce sister-state judgments, that "the question is still open in this court whether a special plea of fraud might not be pleaded, or a plea to the jurisdiction of the court in which the judgment was obtained." 16 U.S. (3 Wheat.) 234, 236 n.c (1818).

Ultimately, in the face of continued post-*Mills* insistence on jurisdictional tests, the Court incorporated international law jurisdictional concerns into its Full Faith and Credit Clause analysis in a series of cases between 1839 and 1850. See, e.g., *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 174 (1850); *McElmoyle v. Cohen*, 38 U.S. (13 Pet.) 312, 314-16 (1839). These cases and others in the series are discussed in Whitten, *supra* note 40, at 574-84. As one commentator has characterized the doctrinal development, "By the Civil War, the state courts' view had won out and the Supreme Court admitted defeat as to its proposed vision in *Mills*." Kogan, *supra* note 13, at 279.

81. "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." U.S. CONST. art. I, § 10, cl. 1.

82. If one could establish that a divorce represented an unconstitutional impairment of a marriage contract, then recognition might be denied. One court argued that such a Contracts Clause argument seemed particularly applicable in cases of legislative, as opposed to judicial, divorce. *Todd v. Kerr*, 42 Barb. 317, 318-19 (N.Y. App. Div. 1864). The *Todd* court declared, however, that it was an open question as to whether a sister-state divorce of even this nature might be overturned based on the Contracts Clause. *Id.* *Todd* was decided on other grounds.

83. This phenomenon was apparently related to the Supreme Court decision in *Trustees of Dartmouth College v. Woodward*, in which divorce laws were explicitly exempted from Contracts Clause attack. 17 U.S. (4 Wheat.) 518, 628-29 (1819). Thus, when courts did raise the Contracts Clause issue, they frequently disposed of it with a cite to *Dartmouth College*. See, e.g., *Tolen v. Tolen*, 2 Blackf. 407, 408-09 (Ind. 1831); *Harding v. Alden*, 9 Me. 140, 150 (1832); *Hull v. Hull*, 22 S.C. Eq. (2 Strob. Eq.) 174, 177 (1848).

Contracts Clause, they echoed the gloss on the Full Faith and Credit Clause suggested by *Borden*. The courts argued that the particular state interests involved in defining marital status demanded either modifying or declining to apply the Contracts Clause. A Kentucky court, for instance, argued that the marriage contract was a contract *sui generis* and a matter of such public concern as to place it beyond the regulations of "mere" commercial contracts.⁸⁴ An Indiana court similarly noted the state interests involved in marriage contracts, then developed an interpretation of the Contracts Clause that clearly implicated concerns for state sovereignty:

[T]he states, in the fair exercise of their legislative powers, do not necessarily involve a violation of the obligation of contracts in passing general laws authorising divorces, if they do not, in the exercise of those powers, pass beyond the rights of their own citizens and act upon the rights of the citizens of other states⁸⁵

As in the line of cases following *Borden*, sovereignty interests are read into a constitutional clause that requires no such reading on its face.

III. THE CONTENT OF THE JURISDICTION TEST

As Part II demonstrates, the adoption of the jurisdiction test safeguarded state sovereignty: The test was adopted, sometimes quite explicitly, as an alternative to the mandatory recognition doctrine of *Mills*; the test was borrowed from the field of international law, in which the central concept of comity safeguarded the authority of forum states; and courts repeatedly grounded their adoption of the jurisdiction test in the rights of states to define the marital status of their own citizens. Understandably, such concerns for sovereignty extended beyond the adoption of the jurisdiction test, and were also manifested as courts gave content to the test, both in the rhetoric and in the effects of leading judicial opinions.

The content of the jurisdiction test may be analyzed in several steps. First, the threshold questions of jurisdictional analysis involved the issue of whose jurisdictional law and facts were to be utilized in the analysis. A survey of the recognition cases indicates that, in the interests of sovereignty, state courts generally insisted on using their own law and their own facts. Second, there was the actual substance of the jurisdictional law that courts developed. Generally, states gained jurisdiction over a marriage based on the domicile of the couple. While such a doctrine might operate smoothly in most divorce cases, substantial difficulties existed when one or both spouses moved out of the state in which they had last resided together as husband and wife before

84. *Maguire v. Maguire*, 37 Ky. (7 Dana) 181, 184 (1838).

85. *Tolen*, 2 Blackf. at 409.

seeking a divorce. Such cases brought out internal strains in the principle of territorial sovereignty and placed the principle in tension with other values and common law principles. States developed varying doctrines to deal with these difficulties, but, again, the principle of territorial sovereignty was generally the primary concern animating judicial analysis.

A. *The Threshold Questions: Whose Law and Whose Facts?*

To say that a court may impose a jurisdiction requirement before recognizing out-of-state divorces begs at least two questions: Whose jurisdictional law applies? And, are the sister state's jurisdictional facts (i.e., the facts, such as who lives where, used by the sister state's court to assert jurisdiction) open to review? When reexamining jurisdiction, forum courts generally provided little deference to either the law or the facts employed by other courts.

1. *Jurisdictional Law*

In very few cases did a forum court look to the law of another state to determine whether that state had proper jurisdiction to issue a divorce.⁸⁶ In the majority of cases, forum courts freely applied their own precedents and understandings of international law. This decision to employ the forum's jurisdictional law over that of the sister state is perhaps most clear in the leading North Carolina case of *Irby v. Wilson*.⁸⁷ The *Irby* court noted that before granting a divorce, a Tennessee court scrupulously obeyed Tennessee's law for obtaining jurisdiction through constructive service of process; however, the *Irby* court held, North Carolina was not bound by Tennessee's jurisdictional law, and could thus require actual service of process for jurisdiction.⁸⁸ Why was North Carolina not bound by Tennessee's jurisdictional law? The *Irby* court cited a familiar principle of international law: "That state [Tennessee] has no power to enact laws to operate upon things or persons not within her territory"⁸⁹

In addition to rejecting the jurisdictional law of the decreeing state, forum courts also rejected another candidate for governing law: the law of the state where a couple was originally married. This law might have controlled because the common law, as Story observed, treated marriage "in no other light than as a civil contract."⁹⁰ Thus, under one theory of divorce, the law of the place

86. The author's research uncovered only two such cases. See *Thompson v. State*, 28 Ala. 12, 20-21 (1856); *Leith v. Leith*, 39 N.H. 20, 41 (1859).

87. *Irby v. Wilson*, 21 N.C. (1 Dev. & Bat. Eq.) 568 (1837).

88. *Id.* at 578.

89. *Id.*

90. STORY, *supra* note 17, § 108.

where a marriage contract was entered into, as with all contracts, continued to govern important aspects of the contract, including under what conditions it might be dissolved, regardless of where the parties to the contract subsequently traveled. Such a theory might have significant implications for jurisdiction over divorce proceedings. For instance, through much of the antebellum period, most Southern states only made divorce available through special acts of the state legislature; under a *lex loci contractus* theory, such law would become part of all marriages contracted in those states, effectively precluding the courts of other states from assuming jurisdiction over such marriages. Precisely this situation obtained in England, which both adopted the *contractus* rule and limited divorce to decrees of Parliament; hence, it was frequently observed "that an English marriage is incapable of being dissolved under any circumstances by a foreign divorce."⁹¹ Although well aware of the English precedent, American courts did not adopt the *contractus* rule, with the sole exception of South Carolina.⁹²

In rejecting the *contractus* rule, American courts referred to those characteristics that distinguished marriage from other contracts:

Other contracts are modified by the will of the parties, and the *lex loci* becomes essential; but not so with matrimonial rights and duties. Unlike other contracts, they cannot be dissolved by the will and consent of those who made them. Matrimonial contracts are *juris gentium*, and admit of no modification by the will of the parties.⁹³

In other contracts, the *lex loci* was important because it was presumably incorporated into the contract by the will of the parties; in the marriage context, however, the will of the parties was of little importance.⁹⁴ Into its place flowed concerns for state sovereignty. One Indiana court argued:

[E]ach country is bound to look to its own laws in the administration of that department [of domestic life], otherwise the whole order of society would be disjointed. If the *lex loci* followed and governed the parties wherever they went, it would lead to inextricable difficulties, and the country would be filled with privileged castes, each living under separate laws.⁹⁵

Forum courts thus rejected the *contractus* rule in order to protect the territorial integrity of state laws.

91. *Id.* § 218.

92. *Hull v. Hull*, 22 S.C. Eq. (2 Strob. Eq.) 174, 179 (1848).

93. *Tolen v. Tolen*, 2 Blackf. 407, 410 (Ind. 1831).

94. For a discussion of the unenforceability of mutual agreements by spouses to modify their marriage status during the 19th century, see Hendrick Hartog, *Marital Exits and Marital Expectations in Nineteenth Century America*, 80 GEO. L.J. 95 (1991).

95. *Tolen*, 2 Blackf. at 410–11.

2. *Jurisdictional Facts*

As with jurisdictional law, forum courts felt at liberty to challenge the jurisdictional facts accepted by out-of-state courts.⁹⁶ Typically, this issue arose when an individual's domicile was in question.⁹⁷ If a forum state felt that a divorce had been granted based on an incorrect finding of domicile by a sister-state court, then the forum state might refuse to recognize the divorce—the divorce would be a fraud on the laws, as in the *Jackson* case. Other courts also seemed to share the *Jackson* court's willingness to question findings of domicile.⁹⁸

Although the decision by a forum court to employ its own jurisdictional facts was significant, forum courts were less explicit in explaining the reasons for doing so than they were in formulating other aspects of recognition and jurisdiction doctrine. Nonetheless, as the *Jackson* opinion suggests, such a decision would be quite consistent with a concern for territorial sovereignty. If a forum court were bound by the jurisdictional facts of another court, its ability to protect the integrity of the forum state's laws would be seriously jeopardized.

B. *The Substantive Law of Divorce Jurisdiction*

Since courts chose a jurisdictional test to protect state territorial sovereignty, it follows that they would develop the mechanics of the test in a manner also reflecting this concern. Accordingly, the state where a marriage was located would have an exclusive right to apply its laws, whether they be restrictive or liberal, to end the marriage. But where was a marriage "located"? Two basic scenarios gave rise to several different answers. First, in scenarios like that of the *Jackson* case, the answer was comparatively easy: If both spouses were permanent residents of New York, then the marriage was "in" New York, and the law of New York would be the exclusive law available to end the marriage. The domicile of the spouses provided an easy rule of decision that preserved territorial sovereignty. But what if the spouses were truly domiciled in separate states? Given the prevalence of marital desertion in the nineteenth century, the dilemma posed by this second scenario was not uncommon. Territorial sovereignty could not provide an easy answer to this dilemma because the sovereignty concerns of two states were implicated. Other concerns and values therefore came into play, and courts produced varying doctrines to deal with the problem of spouses domiciled in separate states.

96. The author's research revealed only one case in which a forum court declined to reexamine the jurisdictional facts of another court. See *Harrison v. Harrison*, 20 Ala. 629, 645 (1852).

97. See *infra* part III.B.1.

98. See, e.g., *Harding v. Alden*, 9 Me. 140, 151 (1832); *Vischer v. Vischer*, 12 Barb. 640, 644 (N.Y. App. Div. 1851).

Nevertheless, although the results of analysis differed from state to state, the framework of analysis used by most courts indicates that the concern for state sovereignty always played a preeminent role in shaping the jurisdictional rules of a majority of the states.

1. *The Requirement of Domicile*

With the sole exception of South Carolina, which adopted the rule of *lex loci contractus*, all states tied divorce jurisdiction to domiciles: A forum court would not recognize a foreign divorce unless the petitioner in the divorce suit had been a permanent resident of the decreeing state. Such an exercise of jurisdiction might be conceptualized as a natural consequence of territorial sovereignty. A New Hampshire court stated: “[Q]uestions of marriage and divorce are not so much questions of contract as of *status* or condition; and according to the well settled principles of international law . . . the *status* of every actual *bona fide* resident, as married or single, must be determined according to the law of the domicile”⁹⁹ In a similar vein, a Rhode Island court argued, “The right to govern and control persons and things within the state, supposes the right, in a just and proper manner, to fix or alter the *status* of the one, and to regulate and control the disposition of the other.”¹⁰⁰

The domicile rule was potentially a rather liberal test, theoretically permitting more than one state (the domiciles of both husband and wife) to assert valid jurisdiction over a marriage. Most states adopted the rule without addressing this separate-domicile problem. A small number of courts, however, employed one of three devices that helped to limit the liberality of the rule and resolved the separate-domicile problem: (1) linking the wife’s domicile to that of the husband; (2) granting jurisdiction only to the state in which the wrong giving rise to the divorce was committed; or (3) requiring that a divorce defendant be served with process before a court could exercise jurisdiction over him. The first two solutions turned on particular conceptions of the nature of marriage and divorce, but were rejected by the majority of states as being too insensitive to the requirements of territorial sovereignty. The third solution, which is discussed in the next Subsection, implicated fairness to litigants, a value that potentially could compete with territorial sovereignty as the preeminent concern of jurisdictional laws. This solution, however, was also rejected by a majority of states.

A court employing the first solution relied on the common law rule that a wife’s domicile always followed her husband’s. Under this doctrine, only the husband’s state of domicile possessed jurisdiction over the marriage. Alabama, Kentucky, and Pennsylvania appear to have applied this common law rule in

99. *Leith v. Leith*, 39 N.H. 20, 33–34 (1859).

100. *Ditson v. Ditson*, 4 R.I. 87, 102 (1856).

the divorce context.¹⁰¹ Most states, however, modified the rule and permitted wives to obtain separate domiciles for the purpose of divorce proceedings.¹⁰² As a Massachusetts court observed, the traditional rule was "founded upon the theoretic identity of person, and of interest, between husband and wife," but the entire purpose of a divorce proceeding "is to show, that the relation itself ought to be dissolved, or so modified as to establish separate interests."¹⁰³

A court might also limit the domicile rule based on the conceptualization of divorce as a matter of criminal law, as expressed in the seminal Massachusetts case of *Barber v. Root*:

Regulations on the subject of marriage and divorce are rather parts of the criminal, than of the civil, code; and apply not so much to the contract between the individuals, as to the personal relation resulting from it . . . and these are regulated with a principal view to the public order and economy, the promotion of good morals, and the happiness of the community. A divorce, for example, in a case of public scandal and reproach, is not a vindication of the contract of marriage, or a remedy to enforce it; but a species of punishment, which the public have placed in the hands of the injured party to inflict¹⁰⁴

Under this theory, jurisdiction flowed from the rights of a state to vindicate its own marriage laws—the power to right a wrong (such as cruelty, desertion, or adultery) that has taken place within its own territory. Courts adopting this theory limited jurisdiction to the single state where a couple was domiciled when the wrong occurred that gave rise to the ground for divorce. This place-of-the-wrong rule was accepted by Louisiana, Massachusetts, New Hampshire, and Pennsylvania.¹⁰⁵ A Pennsylvania court analogized divorce to other areas of the law in which foreign states provided no enforcement: "No country executes the bankrupt laws of another, or takes notice of a foreign revenue law."¹⁰⁶

The place-of-the-wrong rule appears to have been rejected elsewhere.¹⁰⁷ The essential problem was that the rule prohibited the state of new domicile

101. *Thompson v. State*, 28 Ala. 12, 17 (1856); *Maguire v. Maguire*, 37 Ky. (7 Dana) 181, 186 (1838); *Dorsey v. Dorsey*, 7 Watts 349, 350 (Pa. 1838).

102. See, e.g., *Harteau v. Harteau*, 31 Mass. (14 Pick.) 181, 185–86 (1833); *Vischer v. Vischer*, 12 Barb. 640, 643 (N.Y. App. Div. 1851); *Irby v. Wilson*, 21 N.C. (1 Dev. & Bat. Eq.) 568, 582 (1837); *Hull v. Hull*, 22 S.C. Eq. (2 Strob. Eq.) 174, 178 (1848); *Hare v. Hare*, 10 Tex. 355, 358 (1853).

103. *Harteau*, 31 Mass. at 185.

104. *Barber v. Root*, 10 Mass. 260, 264 (1813). This decision was frequently cited by the courts of other states as authority against the *lex loci contractus* rule. See, e.g., *Harrison v. Harrison*, 19 Ala. 499, 506 (1851); *Dorsey*, 7 Watts at 353.

105. *Edwards v. Green*, 9 La. Ann. 317, 318 (1854); *Harteau*, 31 Mass. at 186–87; *Leith v. Leith*, 39 N.H. 20, 40 (1859); *Dorsey*, 7 Watts at 352.

106. *Dorsey*, 7 Watts at 352.

107. See, e.g., *Thompson v. State*, 28 Ala. 12, 17 (1856); *Ditson v. Ditson*, 4 R.I. 87, 103 (1856); *Hare v. Hare*, 10 Tex. 355, 357 (1853) (limiting place-of-the-wrong rule to cases of adultery).

from controlling the marital status of its residents whenever spouses moved from the place of the wrong to the new state before obtaining a divorce. In one stinging attack on both this rule and the *contractus* rule (which were characterized as a “mist of misapplied learning and ingenuity”¹⁰⁸), a Rhode Island court appealed predictably to the notion of state territorial sovereignty:

[A] state cannot be deprived, directly or indirectly, of its sovereign power to regulate the *status* of its *own* domiciled subjects and citizens . . . [and a state] has a right, under the general law, judicially to deal with and modify or dissolve this [marriage] relation . . . by virtue of its inherent power over its own citizens and subjects, and to enable it to answer their obligatory demands for justice¹⁰⁹

Thus, Rhode Island arrived at what was the relatively liberal, sovereignty-enhancing, majority rule for determining proper jurisdiction: Jurisdiction depended “upon the *domicil* of the wronged and petitioning party,”¹¹⁰ regardless of whether that party was a wife or that party had moved after the marital wrong occurred.

2. *The Problem of the Absent Defendant*

The majority rule tended to ignore the impact of a divorce judgment on the defendant-spouse, and most states remained unconcerned about the defendant. A few courts, however, found this tendency to be problematic. If the domicile of the “wronged and petitioning party” were the sole issue in determining jurisdiction, then the defendant would have his marital status determined by foreign laws in a foreign court. Put differently, the exercise of jurisdiction by the petitioner’s home state, based on principles of territorial sovereignty, would infringe on the sovereignty of the defendant’s state. Furthermore, the domicile rule permitted the petitioner’s state to issue a divorce decree without service of process on the defendant, and something seemed unfair about adjudicating a defendant’s marital status without providing him or her with an opportunity to present his or her side of the story.

As a result of these concerns for the problem of the out-of-state defendant, three states, New York, North Carolina, and Pennsylvania, required as prerequisites for recognizing a sister-state divorce that the defendant be provided with personal notice, be a citizen of the sister state, or register an appearance at the divorce proceeding.¹¹¹ New York courts held that the same rules of personal jurisdiction should apply to divorce proceedings as to any

108. *Ditson*, 4 R.I. at 105.

109. *Id.* at 106.

110. *Id.* at 103.

111. See *Borden v. Fitch*, 15 Johns. 121, 142–43 (N.Y. Sup. Ct. 1818); *Irby v. Wilson*, 21 N.C. (1 Dev. & Bat. Eq.) 568, 576 (1837); *Dorsey v. Dorsey*, 7 Watts 349, 352–53 (Pa. 1838).

other civil litigation,¹¹² and added that a violation of these jurisdictional rules would be "contrary to the first principles of justice."¹¹³ A Pennsylvania court argued that the defendant's presence was even more important than the issue of plaintiff's proper domicile, "for a sentence against one whose person was not subject to the jurisdiction would be void on the plainest principles of natural law."¹¹⁴ North Carolina echoed these concerns:

It lies at the foundation of justice, that every person who is to be affected by an adjudication should have the opportunity of being heard in defence, both in repelling the allegations of fact, and upon the matter of law; and no sentence of any Court is entitled, intrinsically, to the least respect in any other Court, or elsewhere, when it has been pronounced *ex parte*, and without opportunity of defence.¹¹⁵

While decisions rejecting *ex parte* divorces tended to emphasize fairness concerns, courts also advanced sovereignty arguments. A North Carolina court observed:

One state cannot send process into another If a person has been brought by force from one jurisdiction into another to be served in the latter with process, nations having regard to their own character, discharge the person, and refuse to proceed in the cause originated by such service of process. Much more, then, ought a Court to refrain from adjudicating against a person belonging to another government [A] state has no power to enact laws to operate upon things or persons not within her territory¹¹⁶

Despite their invocation of lofty principles, New York, North Carolina, and Pennsylvania's concern for fairness to out-of-state defendants may have had self-interested roots. Significantly, states with comparatively strict substantive divorce laws adopted the most stringent service-of-process requirements.¹¹⁷ These states were fundamentally concerned for their own sovereignty: The states with the strictest divorce laws had the greatest reason to suspect that a foreign divorce decree represented an effort by one of their citizens to circumvent their laws. Stringent service-of-process requirements enabled these states to reject out-of-state divorce decrees with ease.

112. See *Borden*, 15 Johns. at 143.

113. *Id.* at 141.

114. *Dorsey*, 7 Watts at 350.

115. *Irby*, 21 N.C. at 576.

116. *Id.* at 577-78.

117. Indeed, as another commentator has observed, the states with the strictest substantive divorce law (such as New York, Pennsylvania, and the Southern states) generally possessed the strictest jurisdictional requirements in the recognition context. Feigenson, *supra* note 30, at 140.

Most courts rejected the position of New York, North Carolina, and Pennsylvania, and permitted valid divorces on no more than constructive notice to the defendant, such as publication in local newspapers. A Rhode Island court provided the most vigorous defense of this practice, drawing on the same concerns of fairness and sovereignty that led North Carolina to the opposite conclusion. The court made its argument by analogizing the marriage status to a *res*:

[T]here is a large class of proceedings *in rem*, or *quasi in rem* . . . in which, the jurisdiction being founded upon the possession of the thing, the decree binds all interested in it, whether within or without the jurisdiction of the nation setting up the court, and whether personally or constructively notified of the institution or currency of the proceeding. This, too, is founded upon a necessity or high expediency [N]ecessity requires the courts to dispense with personal notice, in order to give effect to their judicial orders; since otherwise, the state might be full of the property of non-residents and aliens, applicable to all purposes except the commanding ones of justice. . . .

. . . The right to govern and control persons and things within the state, supposes the right, in a just and proper manner, to fix or alter the *status* of one, and to regulate and control the disposition of the other; nor, is this sovereign power over persons and things lawfully domiciled and placed within the jurisdiction of the state diminished by the fact that there are other parties interested through some relation, in the *status* of these persons, or by some claim or right, in those things, who is out of the jurisdiction, and cannot be reached by its process. No one doubts this, as a matter of general law, with regard to other domestic relations, and what special reason is there to doubt it, as to the relation of husband and wife?¹¹⁸

In addition to arguing in favor of *ex parte* divorces based on the rights of states to control the status of their own citizens, the Rhode Island court also observed that states had a right to apply their own laws to protect all of those “within their gates”:

It is, however, a very narrow view of *the general law*, it is to form a very low estimate of the wisdom which directs its administration, to suppose, that when it can do justice to those *within* its jurisdiction and entitled to its aid only by dispensing with personal notice to those *out* of it, and substituting instead what is possible for notice to them, it is powerless to do this, and so, powerless to help its own citizens or strangers within its gates, however strong may be their claims or their necessities.¹¹⁹

118. *Ditson v. Ditson*, 4 R.I. 87, 100–02 (1856).

119. *Id.* at 101.

Not all courts embraced constructive notice as emphatically as the Rhode Island court; some expressed real discomfort with *ex parte* divorces. These courts often sought to balance the sovereignty interests of a petitioner's state with those of the absent defendant's state. They adopted explicit limitations as to how far *ex parte* divorce decrees would be recognized, most commonly by declining to enforce the alimony aspect of such decrees.¹²⁰ New Hampshire suggested an even more strict limitation: A divorce against an absent defendant might free the plaintiff to remarry, but it would not affect the marriage status of the defendant, much less permit the collection of alimony. Such a rule opened the possibility for husbands without wives, and wives without husbands. New Hampshire explained how this rule would balance the rights of the states of both spouses:

[T]he granting of a divorce to the husband or wife, in the State of his or her actual domicil, while the other party is domiciled in another State, is no interference with the rights of that State, or of its apparently divorced subject. The decree would not be directly binding upon the person of such subject The husband, in case of such divorce by the procurement of the wife, would not be bound by any collateral clause in it, as that he should pay alimony The government of the country of his domicil could not complain; its laws and domestic policy would not be interfered with; it might still prohibit him, if it chose, from contracting another marriage, in the same manner as if the former had not been dissolved.¹²¹

New Hampshire thus developed a creative solution to a basic dilemma running through the jurisprudence of divorce jurisdiction: While jurisdictional rules were developed to protect state territorial sovereignty, the principle of sovereignty did not provide clear answers as to the content of those rules when a husband and wife lived in separate states, implicating the sovereignty interests of both states. In such instances, states might adopt liberal rules, permitting the first spouse to the courthouse to obtain an extraterritorially valid divorce decree; conservative rules, limiting theoretical jurisdiction to one state or imposing procedural protections for absent defendants; or compromise rules, such as New Hampshire's, balancing the sovereignty interests of both states.

IV. CONCLUSION

Pennoyer v. Neff incorporated into the Due Process Clause an understanding of state-court jurisdiction that emphasized state territorial sovereignty. Critics of this tendency in jurisdiction law have argued that

120. See, e.g., *Thompson v. State*, 28 Ala. 12, 19 (1856); *Harding v. Alden*, 9 Me. 140, 151 (1832); *Leith v. Leith*, 39 N.H. 20, 39–40 (1859).

121. *Leith*, 39 N.H. at 39–40.

Pennoyer represented an important break from existing understandings of jurisdiction. For example, Professor Drobak observes:

Pennoyer v. Neff marked the apogee of the state sovereignty theory of personal jurisdiction. . . .

. . . Justice Field, writing for the majority, turned the international law concepts into a formal set of principles that expressed total acceptance of a personal jurisdiction doctrine based on territorial limits of state sovereignty:

[1] [E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . .

[2] [N]o State can exercise direct jurisdiction and authority over persons or property without its territory. . . .

[3] [T]he laws of one State have no operation outside of its territory, except so far as is allowed by comity; and . . . no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.¹²²

Drobak criticizes Justice Field's maneuver: "Although the principles were imposing, they lacked consistent support in the cases and they comprised a model that was practically useless for deciding cases."¹²³ Elsewhere, Drobak notes that cases involving attempts to enforce judgments rendered in other states ("the first cases in the United States to consider personal jurisdiction"¹²⁴) "commingled notions of fairness with the territorial theory of jurisdiction. . . . The courts accepted the proposition of territorial limits on jurisdiction as a maxim, but they did not justify their use of this proposition as a means to protect federalism or the sovereignty of the states."¹²⁵

A survey of the antebellum divorce recognition cases suggests that Drobak and like-minded scholars may underestimate the importance of state sovereignty in the pre-*Pennoyer* law of jurisdiction. While the principles of state sovereignty may indeed be unhelpful for deciding some cases, support for the principles is quite consistent in, and indeed of central importance to, the divorce recognition cases.

This Note has treated the context in which jurisdiction doctrines were developed as an indicator of their ultimate purpose. More specifically, jurisdiction requirements were developed by American courts as a limitation on the sovereignty-threatening possibilities of the Full Faith and Credit Clause. In divorce cases, rather than acknowledging that the Clause might require mandatory recognition of sister-state divorces, courts either ignored (or virtually ignored) the constitutional dimension of the recognition issue or

122. Drobak, *supra* note 11, at 1026–27 (quoting *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877)).

123. *Id.* at 1027.

124. *Id.* at 1020.

125. *Id.* at 1023–24 (footnotes omitted).

insisted that the Full Faith and Credit Clause included a jurisdiction requirement—an apparent assertion of state sovereignty in the face of the nationalist mandate of *Mills v. Duryee*.

In lieu of the Constitution, courts adopted the framework of international law to resolve the divorce recognition problem, basing their analysis on the concept of comity and the Huber/Story/Field principles of territorial sovereignty. Courts derived the jurisdiction requirement from this foundation and stated that the jurisdiction requirement was necessary in order to prevent overreaching by the laws of other states. Jurisdictional limitations in these cases were not just a “maxim,” but an explicit effort by forum courts to protect territorial sovereignty.

In giving content to the jurisdiction test, courts continued to emphasize territoriality and concerns for state sovereignty. Courts rejected the jurisdictional law of decreeing states and states of contract, arguing that the application of foreign jurisdictional laws would threaten state sovereignty by placing some state residents under another state’s laws. Courts adopted this approach in spite of the weight of common law tradition and English practice behind the rule of *lex loci contractus*. Forum courts also routinely declined to accept the jurisdictional facts of foreign courts, permitting themselves full reconsideration of whether a foreign court’s assertion of jurisdiction represented an overreaching by the foreign state’s laws.

Courts tied jurisdiction to the domicile of the petitioning party in a divorce suit on the principle that a state has exclusive authority over the status of its residents. In general, this principle was not overcome either by the common law rule that the domicile of the wife followed that of her husband or by the association of divorce with criminal law. Nor was the principle overcome in the context of the problem of the absent defendant. Only a handful of states required actual service of process on a defendant—in these cases alone do judicial opinions seem to commingle “notions of fairness with the territorial theory of jurisdiction.”¹²⁶ Outside of these states, courts primarily emphasized state sovereignty, often while attempting to fashion rules that balanced the sovereignty interests of both spouses’ states. Furthermore, the states that did concern themselves with fairness to defendants were generally among the states with the strictest substantive divorce laws, and one wonders to what extent the procedural protections these states raised on behalf of individuals may have actually been designed to protect the integrity of the states’ divorce laws.

Because this Note examines just one substantive conflict-of-laws issue, its conclusions about antebellum jurisdictional law must be qualified and could be complemented by similarly focused studies of other issues. This study may be helpful, however, in adding new cases to the debate over early American

126. *Id.* at 1023.

jurisdictional law and in providing a greater sense of the context of the cases examined. For instance, of all the divorce cases cited or discussed in this Note, only two, *Borden v. Fitch* and *Pawling v. Willson*, are among the seventeen cases cited by Professor Drobak in his discussion of early state-court jurisdiction cases.¹²⁷ Furthermore, Drobak's use of these cases might be qualified by noting that both are *New York* divorce cases and that New York's rules of divorce jurisdiction were generally atypical of the country at large. Thus, when Drobak uses *Borden* in support of the proposition that courts relied "on natural law notions of fairness,"¹²⁸ he is misleading because he fails to add the caveats that New York was among the few states to erect procedural protections specifically on behalf of divorce defendants, and that New York's strict substantive divorce laws provided the state with particularly strong sovereignty-related reasons to limit the divorce jurisdiction of other states.

A careful review of divorce recognition cases calls into question the argument that the principles of territorial sovereignty (as articulated in *Pennoyer*) lacked "consistent support in the cases."¹²⁹ This assertion, however, is not to gainsay the argument that the *Pennoyer* principles "comprised a model that was practically useless for deciding cases."¹³⁰ Indeed, an examination of the divorce cases reveals some of the difficulties of applying the *Pennoyer* principles to cases in which the parties to a suit reside in different states. Professor Hazard may thus be correct in asserting that these principles work only in the most trivial scenario, when all the people and property are located in the same state.¹³¹ Furthermore, to acknowledge the strength of territorial sovereignty in pre-*Pennoyer* jurisprudence is not to accept that *Pennoyer* was right to incorporate these concerns into the Due Process Clause. As Professor Weinstein has observed, an analysis of the early cases indicates that territoriality "was developed primarily not to protect *individuals* from government deprivation, as does the Due Process Clause of the Fourteenth Amendment, but under the influence of the Full Faith and Credit Clause to promote harmonious relations among *states*."¹³² The Due Process Clause and the Full Faith and Credit Clause exist for different purposes, and the analysis of jurisdiction under each need not reflect the same set of guiding principles. Therefore, twentieth-century efforts to diminish the emphasis on federalism in jurisdictional analysis, despite the long-standing historical basis of that theme, may indeed represent a worthy project.

127. See *id.* at 1020–24.

128. *Id.* at 1023.

129. *Id.* at 1027.

130. *Id.*

131. Hazard, *supra* note 3, at 265.

132. Weinstein, *supra* note 2, at 59–60 (footnotes omitted).

